Judicial Settlement

of International Disputes

The Importance of Judicial Settlement

by

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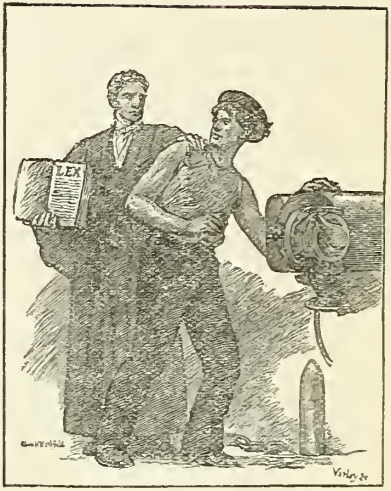
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The Importance of Judicial Settlement

Elihu Root

We all of us agree, and a very large part of the world agrees, that there ought to be an end to war, that it is brutal, wasteful and stupid. We have been talking about it for a great many years. The volume of sound has swelled and grown into a great chorus of universal acclaim for the principles of peace with justice.

But all great movements have a definite development. They pass from stage to stage. The declaration of principles in the beginning is but the first step, and the method of development is from the general to the particular, from the theoretical to the practical, from the proposal to the accomplishment.

Now, the movement for peace, for the settlement of the disputes of mankind by peace-

ful means, is, it seems to me, passing from one stage to another in these wonderful years in which we live. Having accumulated enough momentum, by means of the missionary work that has been done, by means of the propaganda which has been prosecuted, we are beginning now to pass into the stage of careful, thoughtful, definite, certain inquiry into the specific causes of war and the specific remedies to be applied. So only can progress be made towards a practical conclusion.

The organization of this Society is one of the great steps forward in this second stage of development of the world-wide peace movement.

The causes of war may be roughly, and of course superficially and generally distributed into three categories. First, there are the real differences between nations as to their respective rights. One nation claims territory and another claims the same territory. One nation claims the right to trade in a particular way, at a particular place, and another nation claims an exclusive right. There are a myriad ways in which nations may come into dispute regarding real rights,

each nation believing that its side of the controversy is based upon justice.

A second category is what I might call that of policy. The policy of a country may be to push its trade, to acquire territory, to obtain a dominant influence, to insist upon a certain course of action by other countries for its own protection asserting that a different course of conduct would be dangerous to its safety. All those questions of policy, however, are to a considerable degree, and very frequently, dependent upon the determination of certain facts and the decision of certain questions of international law.

A third category of causes of war may be described as being matters of feeling. Deep and bitter feeling is often awakened between peoples of different countries. We have got away from the time when the pique or whim of an individual monarch may plunge his subjects into a bloody and devastating war, but we remain in the time when great masses of people in different countries may become indignant over some slight or insult, or a course of conduct which they deem to be injurious and unfair. These matters of feeling, which

are the most dangerous of all causes of war because they make the peoples of two different countries want to fight,—these matters of feeling ordinarily depend in the beginning upon different views regarding the specific rights of the two countries.

Now, as to the first kind of causes of war, the real controversies about rights, it is plain that they ought to be decided, and that all war based upon them may easily be obviated by having them decided, in accordance with the rules of right reason.

As to the two other classes of reasons for war, it is plain that the little beginnings out of which they arise, the excuses upon which they depend, may also be disposed of if taken in time, and disposed of by reason and kindly consideration. So that while it does not cover the whole ground, while it does not by any means solve the whole question, yet at the bottom of all the attempts practically to dispose of the causes of war, lies the peaceable decision of questions of fact and law in accordance with the rules of justice.

Now we have been for a good many years more and more seeking to accomplish that by

means of arbitration, and the machinery for arbitration has been carefully devised and agreed upon by the nations of the earth at the two successive Hague conferences, so that it is comparatively easy for nations to have recourse to that method of settling their disputes.

But there are some difficulties about arbitration, practical difficulties in the way of settling questions. I have said many times and in many places that I do not think the difficulty that stands in the way of arbitration today is an unwillingness on the part of the civilized nations of the earth to submit their disputes to impartial decisions. I think the difficulty is a doubt on the part of civilized nations as to getting an impartial decision. And that doubt arises from some characteristics of arbitral tribunals which are very difficult to avoid.

In the first place, these tribunals are ordinarily made up by selecting publicists, men of public affairs, great civil servants, members of the foreign offices, men trained to diplomacy; and the inevitable tendency is, and the result often has been, in the majority of

cases has been, that the arbitral tribunal simply substitutes itself for the negotiators of the two parties, and negotiates a settlement. Well, that is quite a different thing from submitting your views of right and wrong, your views of the facts and the law on which you base your claims to right, to the decision of a tribunal, of a court. It is merely handing over your interests to somebody to negotiate for you; and there is a very widespread reluctance to do that in regard to many cases; and the nearer the question at issue approaches the verge of the field of policy, the stronger the objection to doing that.

Another difficulty is that the arbitral tribunals, of course being made up largely of members from other countries, the real decision ordinarily being made by arbiters who come from other countries and not from the countries concerned, questions have to be presented to men trained under different systems of law, with different ways of thinking and of looking at matters. There is a very wide difference between the way in which a civil lawyer and a common-law lawyer will approach a subject, and it is sometimes pretty

hard for them to understand each other even though they speak the same language, while if they speak different languages it is still more difficult.

Another difficulty is that a large part of the rules of international law are still quite vague and undetermined, and upon many of them, and especially upon those out of which controversy is most likely to arise, different countries take different views as to what the law is and ought to be. And no one can tell how one of these extemporized tribunals, picked at haphazard, or upon the best information the negotiators of two countries can get,—no one can tell what views they are going to take about questions of international law, or how they are going to approach subjects and deal with them.

Now, it has seemed to me very clear that in view of these practical difficulties standing in the way of our present system of arbitration, the next step by which the system of peaceable settlement of international disputes can be advanced, the pathway along which it can be pressed forward to universal acceptance and use, is to substitute for the kind of

arbitration we have now, in which the arbitrators proceed according to their ideas of diplomatic obligation, real courts where judges, acting under the sanctity of the judicial oath, pass upon the rights of countries, as judges pass upon the rights of individuals, in accordance with the facts as found and the law as established. With such tribunals, which are continuous, and composed of judges who make it their life business, you will soon develop a bench composed of men who have become familiar with the ways in which the people of every country do their business and do their thinking, and you will have a gradual growth of definite rules, of fixed interpretation, and of established precedents, according to which you may know your case will be decided. It is with that view that I have felt grateful to the gentlemen who have been giving their time and efforts to the organization and establishment of this Society. I am sure that it is a step along the scientific and practical method of putting into operation all the principles that we have been preaching and listening to for so many years. It is practical, and I believe it will be effective.

There is a great deal of work for the Society to do. Our people here in the United States are probably more ready to assent to such a view as this than the people of any other country in the world, because we have been long accustomed to the existence of a great tribunal, a part of whose duty it is to sit in judgment upon the question whether the governments of the sovereign States and the government of our own nation, in their acts, conform to the great principles of justice and right conduct embodied in our Constitution. That arrangement, of embodying the eternal principles of justice in a written instrument, investing a court with the power to declare all acts of Congresses, and legislatures, and Presidents and Governors, void and of no effect when they fail to conform to those principles, is, it seems to me, the greatest contribution of America to the political science of the world. We are accustomed to seeing the actions of the men who hold the power, the actions of the legislative bodies that hold the purse strings, submitted to the adjudication of the court which has no power to enforce its decrees, except the confidence of the whole

people behind it. We are accustomed to that, and it seems natural to us that nations, however great, and rulers, however powerful, should go before a court and submit the question whether their actions and their views accord with the principles of justice. But it does not seem so to most of the world. It is rather a new idea, and it will take time and argument and exposition to bring the world in general to the acceptance of that view. And upon that long pathway this Society has entered. A prosperous voyage to it, and a safe arrival!

I have said that the time has come for practical dealing with specific causes and specific remedies. Do not understand me as believing that this is to be substituted for the continuous and unwearied assertion and reassertion of the great principles upon which the movement for peace and justice must depend in all parts and in every phase. For, however great may be the material wealth and power of these great nations, after all, what rules the world, the one thing that is eternal and all powerful, is the intangible and the sentimental.

The above address was delivered at the opening of the International Conference of the American Society for Judicial Settlement of International Disputes, Washington, D. C., December 15, 1910. In introducing the speaker the presiding officer, James Brown Scott, said:

For centuries it was the plan of the philosopher and the hope of the philanthropist that some means might be found by which international conflicts should be settled peacefully without a resort to arms, and the dreamers of dreams, philosophers and philanthropists, proposed that the questions at issue between nations should be settled either in conference, in diplomatic assemblies or by temporary tribunals of arbitration created for the express purpose. That which the dreamers of dreams have dreamed, and the philosophers have planned, that which the philanthropists saw before them as if in a vision, took definite form and shape in the year 1907, when our accomplished Secretary of State, the Honorable Elihu Root, instructed the American delegation to the Second Hague Peace Conference to propose a permanent court to be composed of judges who should act under a sense of judicial responsibility, and which court should represent the various judicial systems of the world. Pursuant to these instructions the delegation, under the leadership of the Honorable Joseph H. Choate, introduced such a proposition, and after weeks of discussion and debate the Conference adopted a draft convention consisting of thirty-five articles for the organization, the jurisdiction and the procedure of a permanent court of arbitral justice, leaving it, however, to the nations to constitute the court, through diplomatic channels, when an agreement should be reached upon the appointment of the judges.

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Remit to treasurer, J. G. Schmidlapp, Cincinnati, U. S. A. Address inquiries to secretary, Theodore Marburg, Baltimore, U. S. A.

The proceedings of the "Judicial Settlement" Conference at Washington, December 15-17, 1910, will be printed in English, French, German and Spanish. Each member of the Society will be entitled to one copy. Non-members may procure them by remitting the price, One Dollar, to

TUNSTALL SMITH, *Assistant Secretary*,
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Publications of the American Society for Judicial Settlement of International Disputes—

1. The New Era of International Courts, by Simeon E. Baldwin. August, 1910.

2. The Necessity of a Permanent Tribunal, by Ernest Nys. November, 1910.

Supplement—The American Society for Judicial Settlement of International Disputes, by James Brown Scott. November, 1910.

3. The Importance of Judicial Settlement, by Elihu Root. February, 1911.

The Third National Peace Congress will be held in Baltimore, McCoy Hall, Johns Hopkins University, May 3-5, 1911, under the joint auspices of all the leading societies in America devoted to the cause of the settlement of international disputes by means other than war. Noted men from all parts of the country will take part in the congress.